UNITED
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AT

Administrative Tribunal

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ORIGINAL: ENGLISH

ADMINISTRATIVE TRIBUNAL

Judgement No. 665

Cases No. 717: GONZALEZ DE GERMAN
No. 718: MARAIS
No. 719: PURCELL
No. 720: COUDERC

Against: The United Nations Joint Staff Pension Board

THE ADMINISTRATIVE TRIBUNAL OF THE UNITED NATIONS,

Composed of Mr. Jerome Ackerman, Vice-President, presiding; Mr. Hubert Thierry; Mr. Mayer Gabay;

Whereas at the request of Norma Gonzalez de German, Suzanne Marais, Janine Purcell and Janine Couderc, participants in the United Nations Joint Staff Pension Fund (hereinafter referred to as UNJSPF), the President of the Tribunal, with the agreement of the Respondent, extended the time-limit for the filing of an application with the Tribunal to 15 March 1993;

Whereas, on 12 March 1993, the Applicants filed applications requesting the Tribunal, inter alia:

"...

3. To order the rescission of the decision taken by the Standing Committee on behalf of the Joint Staff Pension Board at its 174th meeting, held on 2 July 1992 at Montreal, to uphold the decision of the Secretary of the Board to calculate the pension payable to the Applicant, [as well as the contributions payable by them] by taking into account, for the [years 1990 and 1991], pensionable remuneration scales which do not correspond to the gross salary scales, and to draw all legal consequences from that rescission;

4. To award the Applicant, as costs, a sum payable by the Respondent, assessed at the time of the filing of this application at eighteen thousand (18,000) French francs, subject to adjustment upon completion of the proceedings."

Whereas the Respondent filed his answer on 29 April 1994;

Whereas, on 6 October 1994, the Applicants submitted written observations;

Whereas, on 13 October 1994, the presiding member of the panel ruled that no oral proceedings would be held in the cases;

Whereas, on 13 October 1994, the Tribunal put questions to the Respondent to which he provided an answer on 14 October 1994;

Whereas, on 18 October 1994, the Applicants provided their comments on the Respondent's submissions and he submitted an additional statement on 19 October 1994;

Whereas, on 21 October 1994, the Applicants provided their comments on the Respondent's additional statement;

Whereas the facts in the cases are as follows:

The Applicants Norma Gonzalez de German and Janine Purcell serve at UNESCO Headquarters in Paris as General Service staff members. Both are participants in the UNJSPF since 1972 and 1964, respectively. The Applicants Janine Couderc and Suzanne Marais, also participants in the UNJSPF, served at UNESCO Headquarters in the General Service category from 1968 until 1991 and from 1960 until 1994, respectively, when they separated from service. Both are now the recipients of retirement benefits from the Pension Fund.

On 16 April 1991, the Secretary of the UN Joint Staff Pension Board (UNJSPB) provided the Applicant Couderc with details of her benefit entitlements. In response to her subsequent request of 11 July 1991, the Secretary of the UNJSPB, on 22 October 1991, sent her an explanation of how her early retirement benefit had been calculated, in accordance with the UNJSPF's Regulations and Rules.

On 14 October 1991, the Applicant Gonzalez de German wrote to the Secretary of the UNJSPB pointing out that according to her

annual statement received from the UNJSPF, since 1 January 1990 her pensionable remuneration had been calculated as set forth in Annex II of UNESCO administrative circular No. 1700, i.e. grossing up, through the application of staff assessment rates, 95.5 per cent of the net salary, and thereby excluding a 4.5 per cent non-pensionable component incorporated in the net salary scale. The Applicant contested the pensionable remuneration amounts and consequent pension contribution levels reported by UNESCO on her behalf for the year 1990. The Applicant requested a review of the decision to calculate her pensionable remuneration based on Annex II, claiming that the calculation should have been based on the scales in Annex I of circular No. 1700, which were described as annual salary scales - expressed in gross and net amounts. The Applicant made the same claim for 1991, on the basis of the scales in Annex I of UNESCO administrative circular No. 1752. The Applicants Couderc, Marais and Purcell made similar claims and requests.

Administrative circular No. 1700, dated 12 January 1990 and entitled "Salaries and Benefits for General Service Staff at Headquarters", reported on the recommendations of the International Civil Service Commission (ICSC), following a survey of conditions of employment in Paris. The circular included an explanation in paragraph 5 as follows:

> "The benefits and allowances accorded by employers in Paris and considered by them as non-pensionable, on the basis of the survey, constitute 14.5 per cent of net remuneration. The ICSC considered the level of these benefits to be sufficiently high to recommend the establishment of a non-pensionable component of salary equivalent to 4.5 per cent of net salary at each grade and step."

The circular also explained, in paragraph 13, the distinction between Annex I and Annex II as follows:

> "In the light of the foregoing, the new scale set forth in Annex I will be applied to staff in the General Service category, with effect from 1 January 1990. The reference scale of October 1988 has been updated to take into account

> the evolution of external salaries between October 1988 and October 1989, applying the method used to adjust salaries between the surveys (...). This adjustment of 3.71 per cent is pensionable. The exchange rate used to gross up net salaries and to calculate pensionable remuneration (Annex II) is 6.09 Francs to the dollar, representing the average rate over the preceeding 36 months."

On 10 February 1992, UNESCO issued administrative circulars Nos. 1827 and 1828, in order to dispel certain "misunderstandings" that had arisen with respect to the different remuneration scales in the annexes of its earlier administrative circulars Nos. 1700 and 1752, by clarifying that the amounts set forth in Annex II of circulars Nos. 1700 and 1752 constituted gross salary for pension purposes.

On 2 July 1992, the Standing Committee of the UNJSPB upheld the decision of the Secretary of the UNJSPB concerning the calculation of the Applicants' pensionable remuneration and consequent contribution levels for the years 1990 and 1991. On 16 and 25 September 1992, the Secretary of the UNJSPB informed the Applicants in similar communications that the Standing Committee had decided:

> "(a) To acknowledge receipt of your request for review, concerning the levels of your pensionable remuneration and pension contributions for [the years 1990 and 1991];
>
> (b) To affirm that your appeal involved complex legal issues that were important and merited adjudication by the United Nations Administrative Tribunal; and
>
> (c) To uphold the acceptance by the Secretary of the Board of the levels of pensionable remuneration and pension contributions reported by UNESCO on your behalf for [the years 1990 and 1991]."

On 15 March 1993, the Applicants filed with the Tribunal the applications referred to earlier.

Whereas the Applicants' principal contentions are:

1. Article 54(a) of the UNJSPF Regulations provides that pensionable remuneration is to be determined on the basis of the gross salary of the participant.

2. The UNJSPF should not have accepted any report from UNESCO of pensionable remuneration levels and of pension contributions that were based on scales other than the gross salary scales issued by UNESCO.

Whereas the Respondent's principal contentions are:

1. Within the UN common system, decisions as to the general methodology to be followed in General Service salary surveys and recommendations regarding the salary scale, determined on the basis of salary surveys at particular locations, are delegated to the ICSC which determined that the non-pensionable component in net salaries (here 4.5 per cent) cannot be included in the calculation of pensionable remuneration.

2. Although the listing of two distinct gross salary scales in UNESCO's administrative circulars Nos. 1700 and 1752, applicable to its General Service staff in Paris for the years 1990 and 1991, may have caused some lack of clarity, the intent was clear: to provide greater transparency in a rather complicated area, in the interest of all UNESCO staff members.

The Tribunal, having deliberated from 11 October to 4 November 1994, now pronounces the following judgement:

I. The Applicants appeal from the decision dated 2 July 1992, by the Standing Committee of the United Nations Joint Staff Pension Board (UNJSPB), to uphold the decision of the Secretary of the UNJSPB to calculate the pensions payable to the Applicants by taking into account, for 1990 and 1991, certain pensionable remuneration scales. The position of the Applicants is that, in so doing, the UNJSPB acted unlawfully because the scales did not correspond to the

gross salary scales established for the Applicants. The Applicants' position is based on article 54(a) of the Regulations of the United Nations Joint Staff Pension Fund which provides in part:

> "Pensionable remuneration shall be the equivalent in dollars of the sum of:
>
> (i) the participant's gross salary,
>
> (ii) any language allowance payable to him ..."

The Applicants state that their pensions with respect to the period in question were calculated incorrectly because they were based on a pensionable remuneration scale not termed "gross salary" as such, which differed from the amount described as "gross salary" in Annex I of UNESCO administrative circular No. 1700, dated 12 January 1990 and Annex I to UNESCO administrative circular No. 1752, dated 23 January 1991, with respect to the General Service category.

As the applications present common issues of law and fact, the Tribunal joins them.

II. Although the parties' submissions include a discussion of abstract questions regarding the relationship between the jurisdiction of the Tribunal and the ILOAT, there is agreement as to the Tribunal's competence in this case and accordingly, there is no need for the Tribunal to consider jurisdictional questions.

III. It is undisputed that the calculation of the Applicants' pensions was not based on the figures in Annex I to the administrative circulars, which was entitled "ANNUAL SALARY SCALE Showing Gross and Net Amounts After Application of Staff Assessment." The pensions were, however, derived using those figures and other calculations, on the basis of Annex II to the relevant circulars, which was entitled "PENSIONABLE REMUNERATION

Scale Expressed in French Francs the Equivalent of Which in Dollars Is Pensionable for General Service Category Staff Members at Headquarters."

IV. The difference between the two Annexes to the administrative circulars is explained in the body of circular No. 1700, and the explanation was obviously applicable also to circular No. 1752. The difference stems from a recommendation by the International Civil Service Commission (ICSC) with regard to remuneration levels of the General Service category. The ICSC recommendation involved a revision of its salary survey methodology applicable to Headquarters locations so as to identify a non-pensionable element in the net salary payable at Headquarters locations. Prior to this revision, there had been a substantial number of duty stations, other than Headquarters locations, where a non-pensionable component had been identified and taken into account in the process of arriving at gross salary scales to establish appropriate pensionable remuneration scales. UNESCO administrative circulars Nos. 1700 and 1752 represented the first UNESCO application of the ICSC recommendation regarding this matter. In essence, the ICSC had found that the applicable area salary levels used as comparators in arriving at its recommended General Service category levels incorporated an amount that was non-pensionable. The ICSC concluded that General Service category levels should follow a similar pattern.

V. Although the pertinent ICSC survey had identified a non-pensionable element in area salaries of 14.5 per cent, it recommended that only 4.5 per cent be considered as non-pensionable remuneration for the General Service category at the Paris Headquarters locations. The implementation of this recommendation was calculated by arriving at a gross salary figure for staff assessment and salary payment purposes by "grossing up" the net salary found in the ICSC salary survey in accordance with the standard ICSC procedure for so doing. This gross salary figure was

then reduced by the amount of staff assessment, and the resulting net figure was then multiplied by 95.5 per cent. This calculation produced a net salary figure from which the 4.5 per cent non-pensionable component had been removed. To arrive at the gross salary figure for pensionable remuneration purposes, the net figure was "grossed up" in accordance with the same ICSC procedure.

VI. In effect, the implementation of the ICSC recommendation involved the use of two "gross salary" figures, one for the purpose of determining the salary payable to a staff member and the other for the purpose of calculating contributions to the Pension Fund and benefits payable by it. The 4.5 per cent non-pensionable remuneration element is reflected in the gross salary calculations displayed in Annex II, but not in the gross salary scales displayed in Annex I. However, given the explanations in paragraphs 5 and 13 of circular No. 1700, a reasonable person reading the administrative circulars would understand that Annexes I and II had to be read together in order to determine the gross salary figure for pensionable remuneration purposes within the meaning of article 54(a) of the Pension Fund Regulations.

VII. In developing the two Annexes attached to the administrative circulars, UNESCO was attempting to explain in a reasonably understandable fashion its salary and pensionable remuneration methodology and structure. As a non-pensionable element was present for the first time in the net salary payable to the General Service category at UNESCO's Paris Headquarters, it is not surprising that UNESCO made a special effort to ensure that staff members would see the difference between gross salary for remuneration purposes and for pension purposes.

VIII. The Applicants' challenge to the UNJSPB's decision in this case is, in reality, an exercise in semantics. It rests entirely on the "gross salary" label which appears in Annex I of the administrative circulars but ignores altogether Annex II and

paragraphs 5 and 13 of administrative circular No. 1700 (whose significance plainly carried over to administrative circular No. 1752). The Applicants, who obviously benefited from the ICSC recommended methodology in the form of salary increases and from the partial application to them of the non-pensionable component prevalent in the area, would nevertheless have the Tribunal disregard the evident purpose of the circulars, i.e. to explain the difference between gross salary for pay purposes and gross salary for pension purposes.

IX. Were the Tribunal to sustain the Applicants' selective reference to Annex I as the definitive description of gross salary for the purposes of article 54(a) of the Pension Fund Regulations, it would nullify the ICSC recommendation lawfully adopted by UNESCO and provide an unjust windfall benefit to the Applicants.

X. The Tribunal finds that none of the Applicants could have been misled as to the correct amount of their pensionable remuneration and the explanation therefor. In view of the generous nature of the ICSC methodology adopted by UNESCO, none of the Applicants was injured in any fashion by the pension calculation on the basis of administrative circulars Nos. 1700 and 1752. The Tribunal holds therefore, that, read in their entirety and in context, administrative circulars Nos. 1700 and 1752 established gross salary scales as shown in Annex II for the General Service category, in keeping with the ICSC recommendation adopted by UNESCO. The Fund properly accepted those scales as pensionable remuneration for the calculation of the Applicants' pensions, under article 54(a) of the Pension Fund Regulations.

XI. In view of the Standing Committee's affirmation "that your appeal involved complex legal issues that were important and merited adjudication by the United Nations Administrative Tribunal" the Tribunal finds that the Applicants were thus encouraged to submit the appeals that are now before the Tribunal. This being the case,

it is appropriate that there be an award for costs. Accordingly, the Tribunal orders the Respondent to reimburse the Applicants, in the amount of US$4,500 in total, for the collective costs with respect to this case.

XII. For the foregoing reasons, and except as provided in paragraph XI above, the applications are rejected, as are the individual requests for costs.

(Signatures)

Jerome ACKERMAN
Vice-President, presiding

Hubert THIERRY
Member

Mayer GABAY
Member

New York, 4 November 1994

R. Maria VICIEN-MILBURN
Executive Secretary

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ORIGINAL: ENGLISH

ADMINISTRATIVE TRIBUNAL

Judgement No. 666

Case No. 716: VOROBIEV

Against: The Secretary-General of the United Nations

THE ADMINISTRATIVE TRIBUNAL OF THE UNITED NATIONS,

Composed of Mr. Jerome Ackerman, Vice-President, presiding; Mr. Hubert Thierry; Mr. Francis Spain;

Whereas, on 1 March 1993, Petr Y. Vorobiev, a former staff member of the United Nations Conference on Trade and Development, hereinafter referred to as UNCTAD, filed an application requesting the Tribunal, inter alia:

"1. ...

2. ... [to order that he] be reinstated as a staff member of the United Nations ... [as] the Respondent should have maintained him in service after 31 December 1992, in accordance with the Charter of the United Nations, the Staff Regulations and Rules, [and] the relevant General Assembly resolutions ... [and] to rescind the Respondent's decision of 16 March 1992, that no further requests for extension of his fixed-term appointment after 31 December 1992 would be entertained.

3. ... to recognize:

(a) That by making the decision on 16 March 1992, [see 2 above] ... the Respondent put the Applicant in a discriminatory situation as compared with other staff members and that this decision was illegal;

(b) That continuous pressure was exerted on the UNCTAD Secretariat with the aim of preventing further employment of the Applicant ... and replacing him by a nominee put forward by the USSR Mission;

...

(d) That the Applicant had a certain expectancy of renewal of the contract after September 1991 as specific assignments for the period 1992-1993 were allocated to him;

(e) That the withholding from the Applicant for more than a year of information concerning the decision that his fixed-term appointment would not be extended after September 1991 prevented the staff member from exercising in due time his right to undertake recourse action ..., as specified in the Staff Rules;

...

(g) That the Administration, ... in April 1992, placed the Applicant without his consent under the secondment of a Government for whose State agencies he had never worked and with which he thus had no legal ties;

...

(i) That the Respondent's decision was arbitrary, based on considerations contrary to the Charter, and constituted abuse of authority;

...

(k) That the Applicant was illegally deprived of his right of access to the official documents which were relevant to his case ...;

(l) That the Applicant was illegally and discriminatorily deprived of the possibility of obtaining another assignment in the United Nations system in September 1992 ...

4. ... to order payment to the Applicant of salary lost during the period of unemployment between the expiry of his contract and the reconstitution of his career.

5. ... to order his reappointment as a staff member retroactively from 1 January 1993.

6. In the event of compensation being paid in lieu of reappointment, ... the granting of an award in the amount of three years' net base salary in view of the special circumstances of the case."

Whereas the Respondent filed his answer on 21 July 1993;

Whereas the Applicant filed written observations on 24 November 1993;

Whereas the Applicant filed additional written observations on 22 June 1994;

Whereas, on 14 September 1994, the Tribunal put questions to the Respondent, to which he provided answers on 30 September 1994;

Whereas, on 30 September and 10 October 1994, the Applicant filed additional written observations;

Whereas the facts in the case are as follows:

The Applicant, a national of the former Union of Soviet Socialist Republics (USSR), entered the service of the United Nations on 8 September 1985, as an Economic Affairs Officer, on a two year fixed-term appointment at the P-3, step 1 level, in the Shipping Division of UNCTAD. The letter of appointment stated under "Special Conditions", "staff member is on secondment from the Government of the Union of Soviet Socialist Republics". The Applicant's candidacy for the post had been proposed, on 9 July 1984, to the Secretary-General of UNCTAD, by a representative of that government, as a replacement for another staff member seconded from that government, who was due to retire. After an exchange of correspondence with the Secretariat of UNCTAD, the Government of the USSR agreed, on 15 February 1985, to the Applicant's appointment. His fixed-term appointment was subsequently extended for a further period of 3 years, through 7 September 1990.

In a communication dated 11 September 1990, officials from the Permanent Mission of the USSR to the United Nations in Geneva wrote to the Secretary-General of UNCTAD submitting the candidatures of a number of Soviet nationals to replace the Applicant and another staff member in the Shipping Division. In a further communication dated 5 December 1990, the Deputy Permanent Representative of the USSR to the United Nations in Geneva informed the Secretary-General of UNCTAD that "important and adequate posts have been offered to Messrs. ... and [the Applicant] in the USSR

Ministry of Merchant Marine" and that "the Soviet side has no intention to support the prolongation of their further work in the UNCTAD Secretariat after the expiration of their current contracts".

The Applicant's appointment was extended, on a month-by-month basis, through March 1991.

At a meeting held on 1 February 1991, the Advisory Panel on Personnel Questions of UNCTAD reviewed the Applicant's contractual status. The Panel's report notes, in part:

> "... The Panel had before it the Shipping Division's submissions recommending an extension for [another staff member] of three years and for [the Applicant] through September 1991. In addition, it benefitted from an oral presentation by, and discussion with Mr. Bouayad [Director of the Shipping Division of UNCTAD] in the context of the eligibility of both staff members for the review of their appointments for conversion to career status, bearing in mind that they had both completed five years of service. The panel evaluated the different recommendations concerning the periods of extension and concurred with the Division that the difference reflected different levels of competence and skill requirements. Accordingly, it agreed to recommend approval of the extensions as proposed."

On 27 February 1991, the Chief of Personnel, UNCTAD, informed the Personnel Officer, Office for Human Resources Management (OHRM) at Headquarters, that the Secretary-General of UNCTAD endorsed the recommendation of the Advisory Panel on Personnel Questions, and extended the Applicant's appointment through September 1991.

On 27 March 1991, a letter was sent from the USSR Ministry of Merchant Marine to the Secretary-General of UNCTAD, suggesting that "the time has come to substitute [another staff member] and [the Applicant]. The letter noted that candidates had been proposed for their substitution and that the Applicant and the other staff member would be offered positions with the Ministry of Merchant Marine. In his reply, dated 30 April 1991, the Director for Programme Support and Management Services informed the

Permanent Mission of the USSR that a copy of the letter had been "transmitted to Headquarters for its further consideration and decision".

On 11 July 1991, the Applicant wrote to the Secretary-General of UNCTAD that he wished to remain in the service of UNCTAD. In a note for the file, which was copied to the Applicant, dated 14 August 1991, the Chief, Personnel Service, UNCTAD, recorded the contents of a meeting held with the Applicant regarding his communication of 11 July 1991. In this note, he explained that he had been instructed to reiterate to the Applicant that UNCTAD had proposed a one year extension of his fixed-term appointment, through September 1991, "and that would be a final extension". He noted "that that recommendation took into account [the Applicant's] performance and UNCTAD's skill needs", and further added that in making the recommendation, "UNCTAD had not been influenced by the question of secondment under discussion at New York. Indeed, in line with Headquarters instructions, UNCTAD had examined the contractual status of various staff members who had served for at least five years and whose letters of appointment indicated they were on secondment, using the same criteria used in [the Applicant's] case."

Regarding discussions with Soviet authorities on the Applicant's status and replacement, the Chief, Personnel Service, stated that those authorities had "indicated orally to various senior officials in UNCTAD and twice in writing that the Ministry of Merchant Marine, which had originally released [the Applicant] for service with UNCTAD, had made plans to re-absorb him. The Soviet authorities had also indicated that [the Applicant] had been informed. [The Applicant] stated that he had received no details from the Soviet authorities on the matter."

On 23 August 1991, the Applicant sent to the Chief, Personnel Service, a memorandum supplementing his record of their meeting, which included the following:

"...

> The decision of the UNCTAD Secretariat not to extend my contract after September 1991 put me in a very difficult position. To date, I have not been offered a suitable job in accordance with my competence and experience in the USSR Ministry of Merchant Marine. In view of rapidly increasing unemployment in my country and the deepening economic crisis, it will be almost impossible for me to find a suitable job immediately upon my return to the USSR. This situation is further aggravated by the fact that my thirteen year old daughter is now undergoing serious medical examinations.
>
> ...
>
> I kindly request the Secretariat to grant me a short-term extension of my contract to allow me to complete the preparation of the report 'The Convention on a Code of Conduct for Liner Conferences in the Nineties' for the benefit of the organization and at the same time to allow me to complete medical treatment for my daughter and ultimately to find a suitable job in my country. I understand problems of the UNCTAD Secretariat and at the same time I expect the Secretariat would give full consideration to my situation as well.
>
> ..."

On 30 August 1991, the Deputy Permanent Representative of the USSR submitted additional candidates "for replacement of [the Applicant]."

On 18 September 1991, the Director of the Medical Service in Geneva wrote to the Chief of Personnel of UNCTAD, advising that he had received a medical report to the effect that the health of the Applicant's daughter made her presence in Geneva for another six months desirable. On 19 September 1991, the Chief of Personnel of UNCTAD wrote to OHRM that, in light of this medical opinion, UNCTAD would be prepared to extend the Applicant's contract for a final six months, subject to approval by OHRM.

Accordingly, the Applicant's contract was extended for six months, through 31 March 1992. The letter of appointment stated as a "special condition" that the Applicant "is on secondment from the

Government of USSR". In a memorandum dated 14 November 1991, the Applicant informed the Chief of Personnel that "although [he did] not object in principle to be on secondment, in the present situation it loses to a great extent its significance as ... [his] former employer, the USSR Ministry of Merchant Marine has ceased to exist and it does not have any legal successor in the new USSR government structure".

On 17 January 1992, the Applicant filed a complaint with the Panel on Discrimination and Other Grievances which recommended on 21 February 1992, to the Director-General of the United Nations Office in Geneva, as follows:

> "4. Given that [the Applicant's] performance evaluation reports are good and that his daughter is required to continue her medical treatment in Geneva, the Panel regrets that [the Applicant's] request of extension of his contract was denied. The Panel recommends that the administration of UNCTAD reconsiders its decision and grants [the Applicant] an extension up to December 1992."

On 23 January 1992, the Applicant requested the Secretary-General to review the decision not to extend his fixed-term appointment beyond 31 March 1992.

On 27 February 1992, the Acting Chef de Cabinet advised the Applicant that a further extension of his appointment would depend on a decision by the Applicant's department and that the Panel on Discrimination and Other Grievances' recommendation had been referred to UNCTAD.

On 16 March 1992, the Director, Staff Administration and Training Division, OHRM, after consultations with UNCTAD, informed the Applicant as follows:

> "You entered the service of the Organization on 8 September 1985, and were given a fixed-term appointment on secondment from the USSR Government. Since that time, you have served in the Shipping Division of UNCTAD at the P-3 level. Your successive performance evaluation reports ('PER') contained mostly 'B' ratings, with a few 'A's' and 'C's' (the latter in your first PER). Those ratings reflected the assessment made by your immediate supervisor

at the section level. In both PERs, the overall rating was 'A good performance', reflecting the Shipping Division Director's assessment of your performance in relation to that of other P-3 staff in the Division and in UNCTAD in general. I note that you did not rebut any of those PERs.

Your contractual status was reviewed in February 1991. By that time, you had served for more than five years, and were eligible to be considered for career appointment in accordance with General Assembly resolution 37/126. Due note was taken at the time of the recent developments on the question of secondment from government service. The UNCTAD Advisory Panel on Personnel Section recommended that your appointment be extended through September 1991 after a careful evaluation of your performance and of the needs of the service. The recommendation was reviewed and approved by the Secretary-General of UNCTAD and OHRM. The communication from the USSR Ministry of Merchant Marine, dated 27 March 1991, which you mention in your letter to the Secretary-General, played no role in the decision. All this was explained to you in the course of your meeting with [the Chief, Personnel Service] on 14 August 1991.

On 23 August 1991, you requested a 'short-term extension' of your contract in order for you to complete the preparation of a report on the Convention on a Code of Conduct for Liner Conferences in the Nineties. You pointed out that such an extension would allow your daughter to complete her medical treatment and would allow you to find a suitable job in your country. You stated that it was your 'firm decision' to return to your home country upon the expiration of your contract.

[The Chief, Personnel Service] sought confirmation of the requirements of your daughter's medical treatment. After being informed that a treatment of approximately six-month duration was required, OHRM concurred with UNCTAD's recommendation that you be given a final extension of your fixed-term appointment through 31 March 1992 on humanitarian grounds.

You are now submitting a new medical certificate, dated 9 January 1992, indicating that your daughter's treatment requires her continuing presence in Geneva for at least one year. The Organization fully appreciates your concern in that respect but you must understand that such personal considerations cannot be the determining factor in making staffing decisions except on a limited, short-term basis. The exigencies of service must take precedence.

However, in view of the recruitment freeze recently announced by the Secretary-General, and in view of the fact that you have not yet completed your main assignment (i.e., your work for the Review of Maritime Transport), I am pleased to inform you that the Secretary-General has decided to extend your fixed-term appointment until 31 December 1992. This is a reasonable period during which you should be able to complete that assignment.

I wish to underline that this is a final decision, and that no further requests for extension, on any ground, will be entertained."

The Applicant's appointment was extended through 31 December 1992, the letter of appointment stating as a "special condition" that the Applicant was on secondment from the Government of the USSR.

On 2 and 23 April 1992, the Applicant wrote to the Chief, Personnel Administration Section that he had never served as an official of any other State than the USSR and "that in signing the letter of appointment I understand that the reference to secondment is without prejudice to my current or future contractual status".

On 23 April 1992, the Applicant lodged an appeal with the Geneva Joint Appeals Board (JAB). The JAB adopted its report on 8 December 1992. Its conclusions and recommendations read as follows:

"37. In spite of the fact that the Appellant's fixed-term appointment has been renewed on several occasions, the Panel concludes that the surrounding circumstances cannot be held as having created a legitimate expectancy of its renewal or conversion to a career appointment.

38. The Panel further concludes due process has been respected before the contested decision was reached.

39. The Panel finally concludes that the evidence available to the Panel does not substantiate the allegation that the contested decision is tainted with prejudice, abuse of authority or extraneous factors.

40. While the Panel is not in a position to judge the validity of the reorientation exercise in UNCTAD's Shipping Division, it notes that the Appellant's overall performance has been rated as good and that he maintains an excellent

working relationship with his supervisors and colleagues. The Panel also perceives that the work programme of the Shipping Division after the reorientation exercise is, apparently, not so radically changed as to render the Appellant's skills completely redundant.

41. ... The Panel was given a ... medical certificate attest[ing] that, thanks to the treatment she is receiving in the Geneva Cantonal Hospital and at her home, the health of the Appellant's daughter is improving but that it is indispensable that she continues to receive this treatment for two more years.

42. In view of the foregoing and based on humanitarian grounds, the Panel urges that, as an exceptional measure, the latest medical certificate mentioned in the foregoing paragraph be taken fully into consideration and recommends that the Appellant's appointment be extended in order for his daughter to follow her medical treatment.

43. The Panel makes no further recommendation in support of this appeal."

On 15 December 1992, the Director of Personnel transmitted to the Applicant a copy of the report and informed him, inter alia, as follows:

"...

The Secretary-General wishes to emphasize, ..., that personal reasons cannot be the determining factor in personnel decisions except on a limited, short-term basis. In your case, the extension of your contract for 15 months was sufficient for satisfying such humanitarian concerns. The Secretary-General, therefore, cannot accept the Board's recommendation for extending your appointment and has decided that your contract will not be extended beyond 31 December 1992, the date on which your current contract expires.

..."

On 1 March 1993, the Applicant filed with the Tribunal the application referred to earlier.

Whereas the Applicant's principal contentions are:

1. The decision not to renew his fixed-term appointment was discriminatory, arbitrary and tainted by extraneous factors, namely the continuous pressure of the Government of the USSR on UNCTAD to prevent his further employment.

2. The Applicant had an expectancy of renewal of his appointment. Following five years of good service, he should have been given every reasonable consideration for a career appointment, according to General Assembly resolution 37/126.

Whereas the Respondent's principal contentions are:

1. The Applicant has not established the validity of his allegations that the decision not to renew his fixed-term appointment was discriminatory.

2. The Applicant had neither the right to nor any expectancy of continued employment beyond his fixed-term appointment.

3. The Applicant received reasonable consideration for a career appointment pursuant to General Assembly resolution 37/126 of 17 December 1982.

The Tribunal, having deliberated from 30 June to 14 July 1994 in Geneva, and from 12 October to 4 November 1994 in New York, now pronounces the following judgement:

I. While the Respondent asserts that the decision not to extend the Applicant's appointment or to grant him a career appointment was not due to alleged pressure arising from the Applicant's purported status of secondment, the Tribunal is of the view, nevertheless, that it should deal briefly with the question of whether the Applicant was on secondment. This should be done because the question of secondment was, at the very least, a backdrop against which the entire case was played out.

II. The issue of secondment was dealt with by the Tribunal, in the recent past, in Judgement No. 482, the case of Qiu, Zhou and Yao (1990). The main criteria for secondment set out in this judgement are not fulfilled in the present case. Details concerning the nature and conditions of the Applicant's employment with the Government of the USSR are not given in the letters of appointment or, indeed, in any other document. The Administration has not produced any agreement concluded with the Government of the USSR, nor has it produced any document in which the Applicant's situation is defined in writing or the conditions of his secondment specified.

The Tribunal was not provided with any details concerning the Applicant's post in his own country or of the conditions governing his re-integration into such post. If an agreement on his secondment did exist, it was not brought to the Applicant for his consent. Although there are references in various letters to the re-employment of the Applicant in the Ministry of Merchant Marine, the references are too vague to be of consequence and, indeed, there is disagreement as to whether the Applicant was offered such re-employment.

It is difficult, if not impossible, to imply from the use of the term "secondment" in this case that the Applicant, posted away, as he was, from his establishment of origin, had the right to revert to employment in that establishment at the end of the period of secondment, with concurrent rights such as promotion and retirement benefits.

III. Because of its finding in paragraph II supra, the Tribunal does not have to deal with the submission of the Applicant that the Ministry of Merchant Marine of the USSR, for which he worked in 1985, no longer exists.

IV. The Applicant first entered UN service in 1985 on a two-year fixed term contract which was renewed for a three year period through 1990. He was then accorded further extensions, through

December 1992. These latter extensions were granted on humanitarian grounds and because of the necessity to conclude certain work projects. The Applicant was given an UNPROFOR appointment in 1993. His claims in relation to this matter need not concern the Tribunal. Indeed, they were not part of the JAB's deliberations.

V. The thrust of the Applicant's complaint is that he was not accorded every reasonable consideration for either a long-term extension or a career appointment in accordance with General Assembly resolution 37/126, following the completion of five years of continuing good service. This failure arose, in the Applicant's submission, from pressure exerted on the UNCTAD Administration by officials of the USSR Ministry of Merchant Marine (Morflot). The Applicant says that, from mid-1990, these officials sought his immediate replacement by another Morflot specialist, through oral and written requests.

There is no doubt that the Ministry sought to influence UNCTAD. This was done by letters dated 11 September 1990, 5 December 1990 and 25 March 1991. The letter of 11 September 1990 submitted six names as replacements for the Applicant and a colleague. The letter of 5 December 1990 contained an expression of the intention of the Soviet authorities not to support the prolongation of the further work of either the Applicant or a colleague in the UNCTAD Secretariat after the expiration of their contracts. The letter of 25 March 1991 indicated that there should be an infusion of new blood into UNCTAD and that the Applicant and a colleague should be replaced. Indeed, there was also a letter, as late as 30 August 1991, suggesting, yet again, a candidate to replace the Applicant.

There were also oral representations. Mr. Victor Busuttil, the Chief of Personnel, UNCTAD, informed the Applicant that Ministry of Merchant Marine officials had advised senior UNCTAD officials that they had made plans to re-absorb him.

VI. The Respondent contends that the decision not to grant the Applicant a career appointment was taken by the Administration on the recommendation of the Advisory Panel on Personnel Questions which stated that "The Panel's review of the contractual status of these members was, accordingly, without prejudice to the question of secondment itself, which was not within the Panel's purview." The Panel recommended a three-year extension for the Applicant's colleague, and an extension until 30 September 1991 for the Applicant. According to the Minutes of the meeting of the Advisory Panel on Personnel Questions, the Panel came to these conclusions having "evaluated the different recommendations concerning the periods of extension and [having concurred] with the Division that the difference reflected different levels of competence and skill requirements." In reply to a question put by the Tribunal, the Respondent has been unable to provide documentation comparing the different levels of competence of the Applicant and his colleague or different skill requirements. The Minutes of the meeting refer to "an oral presentation by, and discussion with Mr. Bouayad [Director of the Shipping Division]." The Tribunal finds it disturbing that no supporting documents are available on such a central issue.

VII. The Respondent accepts that, after five years of continuing good service, staff are entitled to every reasonable consideration for a career appointment. However, he notes that the fact that staff are entitled to such consideration does not mean that every staff member, whether or not on secondment, must be retained. He refers to the imperative of granting a career appointment only to staff of the highest standard of competence.

The Respondent also refers to the conclusion of the Joint Appeals Board, that the decision in relation to the Applicant was motivated by an assessment of the Applicant's performance in comparison with that of his peers.

VIII. The Tribunal recognizes that administrative and operational complexities ensued for the Secretary-General following the

judgement in Qiu, Zhou and Yao. It considers that the Secretary-General, in setting up the Advisory Panel on Personnel Questions to assist him in dealing with the kind of situation revealed in the Applicant's case, showed good faith in attempting to observe the principles set forth in that judgement.

It is necessary, however, to examine the composition of the Advisory Panel and because of the allegation of influence on the part of the Ministry officials, the state of knowledge of the members of the Panel. Mr. Busuttil, the Chief of Personnel, Administrative Section, Mr. Bouayad, Director of the Shipping Division and Mr. Civili, Director for Programme Support and Management Services, were clearly aware of the Soviet intervention in the Applicant's case as they were centrally involved in the negotiations for an extension of his appointment. Mr. Krasnov, Director, International Trade Division, and a Soviet citizen who was also a member of the Panel, in a written submission attached to the Applicant's written observations on the Respondent's answer, states that Mr. Bouayad's oral presentation to the Panel was "based on such arguments as the request of the USSR Mission to replace [the Applicant] with another Soviet candidate." However, the other members of the Panel, in response to questions put by the Tribunal, said they were not aware of any attempted influence by the Soviet Government.

It is unclear whether Mr. Krasnov's statement refers to what was actually said in the oral presentation of Mr. Bouayad, or what he believes was the motivation behind Mr. Bouayad's recommendations. The Tribunal finds that the responses of the other Panel members tend to suggest the latter interpretation. The question, then, is whether the participation of the aforementioned persons, who had knowledge of the intervention of the Soviet Government, invalidated the proceedings of the Panel and its conclusions.

IX. The Applicant would have the Tribunal accept that UNCTAD acceded to pressure, although he now asks that the Tribunal conclude that the UNCTAD Administration withheld from the Panel

important information concerning the growing pressure exercised by the USSR Government on the UNCTAD Secretariat. He says that while the Panel may have been unaware of the Soviet intervention, the Administration's recommendation to the Panel to extend the Applicant's appointment only to the end of September 1991, fully coincided with the wishes of the Soviet Government.

There is no dispute that the Panel had before it a memorandum from Mr. Bouayad of 10 August 1990, suggesting an extension of the Applicant's appointment by one year and setting out reasons for this extension. There is another memorandum of 8 October 1990, from Mr. Vogel, the Deputy Director of the Shipping Division, suggesting an extension for the Applicant and his colleague, of one year. This memorandum makes reference to the Soviet Mission's interest in the matter. It is unclear whether this memorandum was before the Panel, although it would appear that it was not, given the nature of the replies of the Panel members to the Tribunal's questions and despite the Respondent's conflicting submissions on this point. The Tribunal notes that this memorandum was introduced in the record by the Respondent specifically in response to a request by the Applicant for the documents submitted to the Panel on his case. In response to a subsequent question by the Tribunal, the Respondent indicated uncertainty as to whether the document was, in fact, distributed to members of the Panel. This is a most unsatisfactory way of presenting the Respondent's case to the Tribunal, particularly in light of the significance of the document in determining whether the Panel members were aware of the Soviet intervention on the Applicant's case. The conflicting information given to the Tribunal suggests the possibility that the memorandum may have been an influential factor in the decision relating to the Applicant.

There is also a memorandum of 24 January 1991, to Mr. Busuttil from Mr. Bouayad, on the contractual status of the Applicant's colleague, containing the proposal to extend his appointment for three years and setting forth the grounds for the proposal.

The Applicant is unhappy about the method used in making known to the Panel the facts of his case, as opposed to the way in which his colleague's case was presented. The Applicant says that the anomalies in the presentation by the UNCTAD Administration of the two cases, the fact that there was a written recommendation in his colleague's case as opposed to an oral presentation in his own case, put him at a distinct disadvantage and led to a foregone conclusion. The Applicant complains that, in the case of another Soviet staff member in respect of whom a similar request for non-extension was made by the Government, a completely different course was adopted. The Applicant complains that he did not receive the same consideration of his legitimate career interests.

The Applicant's argument, therefore, is that those who presented the case to the Panel, conscious, as they were, of the Soviet Government's views, presented it in such a way that he would not be considered for the kind of appointment which he felt was his due.

X. The Tribunal, having examined all the evidence, notes that the motivation behind the recommendation made to the Panel in the Applicant's case might well be subject to question as the officials who made the recommendations had been in direct contact with the Soviet authorities. However, the Tribunal does not find that there is sufficient evidence to conclude that the Panel's deliberations and ultimate recommendation were decisively influenced thereby.

XI. Indeed, there is evidence to the contrary. For, in the cases of the two other Soviet staff members referred to above, the Soviet Government made similar interventions and yet their appointments were renewed. The Applicant has not produced any reason as to why the Administration would, in that regard, improperly treat him differently from these two. It is correct, of course, that the Applicant's case was dealt with against a

background in which secondment was a factor for the Administration (although not for the Panel). If this factor influenced the Administration in the Applicant's case, why not in the other cases?

Further, if the Applicant had been the object of discrimination, it would be difficult to explain the opportunities afforded him by the Respondent, so that his ill child could be cared for.

XII. While the Tribunal rejects the main arguments in the Applicant's case, some of his concerns are valid. The Director of Staff Administration and Training Division, OHRM, noted an apparent discrepancy in his performance evaluation reports and expressed her concern that the case was discussed with the Soviet Government outside the channels set up for the review of the contractual status of staff members whose letters of appointment indicated that they were on secondment. These are legitimate concerns. So are the apparent contradictions between work performance and re-orientation of work as the reasons for the decision not to extend his appointment. These circumstances, as well as those in paragraph IX above, and the absence of essential documentation referred to in the last sentence of paragraph VI above, compel a finding of procedural irregularities. As these caused injury to the Applicant, he is entitled to compensation.

XIII. Lastly, the Applicant refers to the ILO case of Reznikov (Judgement No. 1249). There is, however, a fundamental distinction between that case and the Applicant's, in that in the former case, the Director-General felt himself bound by the attitude of the Government of the USSR.

XIV. For the foregoing reasons, the Tribunal orders the Respondent to pay to the Applicant nine months of his net base salary as at the time of his separation from the service of UNCTAD.

XV. All other pleas are rejected.

(Signatures)

Jerome ACKERMAN
Vice-President, presiding

Hubert THIERRY
Member

Francis SPAIN
Member

New York, 4 November 1994

R. Maria VICIEN-MILBURN
Executive Secretary